IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 6TH DECEMBER 2006 / 15TH AGRAHAYANA 1928

FAO.No. 29 of 2006

OS.181/2005 of PRL.S.C.,THALASSERY
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APPELLANT/RESPONDENT/DEFENDANT:

MOOLIYIL PADINHJAREKANDY SHEELA,
D/O.MOOLIYIL BALAN, AGED 47 YEARS,
NO OCCUPATION, ELAYAVOOR AMSOM,
MUNDAYAD DESOM,
P.O.MUNDAYAD, KANNUR DISTRICT.

BY ADV. SRI.A.MOHAMED MUSTAQUE
SRI.M.K.SUMOD

RESPONDENT/PETITIONER/PLAINTIFF:

VANIYANKANDY BHASKARAN, S/O.JANAKI,
AGED 72 YEARS, NO OCCUPATION, CHIRAKKAL
AMSOM DESOM, P.O.CHIRAKKAL, KANNUR 11.

BY ADV. SRI.V.RAMKUMAR NAMBIAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 24/11/2006, THE COURT ON 06/12/2006 DELIVERED THE FOLLOWING:

P.R. Raman & K.P.Balachandran, JJ.

F.A.O.No. 29 Of 2006

JUDGMENT

Balachandran, J.

This appeal is filed against the interim order, granting injunction, restraining the defendant from taking any steps in execution to evict the plaintiff and members of his family from the scheduled property and the building therein, till the disposal of the suit O.S.No.181/05. The defendant/counter petitioner in I.A.No.2002/05 in O.S.No.181/05 on the file of the Subordinate Judge's Court, Thalassery is the appellant.

2. For a proper appreciation of the case, certain facts are required to be stated. The scheduled property and the building therein originally belonged to the respondent Bhaskaran. He executed Assignment Deed No.1431/86 in favour of the appellant, assigning his rights over the

scheduled property and the building. According to the respondent, though the assignment deed purports to be a sale in relation to the property and the building, it was actually being executed by way of security for a loan amount of Rupees fifty thousand availed of by him from the appellant and her husband Venugopalan. However, the respondent and his family continued residence there under a rental arrangement entered into with the appellant. The said rental arrangement, according to the respondent, was being brought into existence on a blank signed stamp paper, got signed from his wife Revathy at the time of availing of the loan. However, on the basis of the assignment deed, the appellant effected mutation and is paying tax for the scheduled property as also the building therein. In the meanwhile, the scheduled property was attached in O.S.No.176/82 on the file of the Sub Court, Thalassery, a suit instituted by the Syndicate Bank against the respondent for the

amounts due from him. The appellant filed a claim petition in the said suit. The said claim petition was dismissed. Hence, she discharged the entire debt due to the Bank under the decree in O.S.No. 176/82 and saved the property from sale.

3. The claim petition filed in O.S.No.176/82 was resisted by the respondent, contending that the assignment deed executed in favour of the appellant, did not in fact operate as transfer of title over the scheduled property and the building in favour of the appellant, as that was being executed only as a security. In view of the said contention O.S.No. 239/90 was filed before the Sub Court, Thalassery by the appellant for recovery of possession of the scheduled property and the building on the strength of her title with damages for use and occupation. While the said suit was pending, she filed R.C.P.No.292/93 against Revathy, the wife of the respondent, under Sections 11(2)(b) and 11(3) of the Kerala Buildings (Lease and Rent

Control) Act, 1965, alleging, inter alia, that the rent of the scheduled building at the rate of Rupees three hundred per month is in arrears from August 1989 and that she needs the scheduled building for her own occupation. The said RCP was dismissed by the Rent Control Court, allegedly on the ground that the title in relation to the scheduled building involved, was being agitated in O.S.No.239/90 aforesaid. However, the appellant filed R.C.A.No.197/94 before the Rent Control Appellate Authority and eviction prayed for was allowed. Revathy, the wife of the respondent, who was the counter petitioner in the RCP, filed a revision before this Court as C.R.P.No.2532/96. Against the dismissal of O.S.No.239/90, A.S.No.609/92 filed by the appellant was also pending before this Court. As per the common judgment dated 2.4.2004 in A.S.No.609/92 and C.R.P.No.2532/96, the title of the appellant over the scheduled property and the building was upheld

and eviction order in R.C.A. No.197/94 was confirmed.

4. The appellant filed E.P.No.407/04 seeking eviction of the tenant and delivery of the building to her. The tenant, namely, Revathy, the wife of the respondent, entered appearance before the Execution Court and the said court ordered delivery on 2.4.2005. Since the delivery was resisted by the respondent herein, the court ordered delivery to be effected with police aid on 18.7.2005. It is submitted that R.C.R.P.No.2/05 filed against the order of delivery passed in E.P.No.407/04 is pending before the District Court, Thalassery. It is the case of the respondent that after filing the execution petition, a mediation was effected, whereby the amount due to the appellant with interest was ascertained at Rupees two lakhs and the respondent paid Rs.1,25,000/- on 21.2.2005 and the appellant agreed to withdraw the execution petition on 28.2.2005 unconditionally and that she

will execute an assignment deed in favour of the respondent on 10.3.2005 on the respondent paying the balance amount of Rs.75,000/-. It is his case that an agreement also was executed on 28.2.2005, agreeing to withdraw the execution petition on 28.2.2005, but that execution petition was not withdrawn.

5. It is, in the above circumstances, that the respondent filed the present suit O.S.No.181/05 for specific performance of the agreement dated 28.2.2005, against the appellant on receipt by her of the balance amount of Rs.75,000/- and for an injunction restraining eviction in execution of E.P.No.407/04 in R.C.P.No.292/93.

6. The learned Sub Judge, who considered the injunction petition, namely, I.A.No.2002/05 in O.S. No.181/05 allowed injunction as prayed for. Hence this appeal by the aggrieved defendant.

7. It is contended before us by the learned counsel for the appellant that vide common judgment

in A.S.No.609/92 and C.R.P.No.2532/96 this Court has upheld her title over the scheduled property and the building and eviction was ordered, accepting her claim for eviction under Sections 11 (2)(b) and 11(3) of Act 2 of 1965 and that execution of the decree legally obtained by her cannot be restrained; that the alleged unregistered agreement dated 28.2.2005 is a manipulated document and is not one executed by the appellant; that for the sole reason that no criminal complaint is filed by the appellant against the respondent, the trial court has granted injunction as prayed for and that the said order cannot, but, be said to be perverse and deserves to be set aside.

8. It is not in dispute that the alleged agreement dated 28.2.2005 is an unregistered agreement on a stamp paper worth Rupees hundred, allegedly purchased in the name of the appellant. The mere fact that the endorsement on the stamp paper shows that the stamp paper was purchased in

the name of the appellant is no reason to hold that it was actually purchased by the appellant. There is, absolutely, no evidence in the case that the said agreement was executed by the appellant, except the mere allegation made by the respondent in the suit. It is worthy to note that though the case of the respondent is that the appellant agreed therein to withdraw E.P.No.407/04 on 28.2.2005 unconditionally, the fact remains that it was not so withdrawn. Though the judgment debtor in R.C.P. No.292/93, who is none other than the wife of the respondent, had entered appearance on the execution side in E.P.No.407/04, she did not raise a little finger to point out to the Execution Court that any such agreement had been entered into between the decree holder and her husband and that satisfaction of the decree is, therefore, to be recorded. On the other hand, what has happened is that delivery was ordered on 2.4.2005. The said delivery was resisted by the respondent and the Execution Court ordered

delivery of the property with police aid on 18.7.2005. Then also, the respondent did not bring to the notice of the Execution Court that the decree is satisfied by adjustment and that the said adjustment has to be recorded and the EP dismissed. On the other hand, he was instituting the present suit for specific performance of the alleged agreement and to get injunction restraining delivery being effected in execution of E.P.No. 407/04 by the appellant/decree holder.

9. The court below has simply accepted the contention of the respondent casting burden on the appellant to show prima facie that the alleged agreement is a concocted document. The trial court accepted the genuineness of the suit agreement for the reason that no criminal complaint is initiated against the respondent by the appellant. The approach made by the trial court in considering the question of existence of strong prima facie case for the grant of interim prohibitory

injunction, restraining execution of a legally obtained decree, is nothing, but perverse. The trial court has not considered the question of balance of convenience or the question of irreparable injury and has in a mechanical manner granted injunction as asked for.

10. It is worthy to note that under Order XXI Rule 2 and Section 47 of CPC any payment under a decree made out of court or any adjustment of the decree has to be certified, failing which the same would not be recognised by the executing court. The question was considered by the Apex Court in **Badamo Devi v. Sagar Sharma** [(1999) 6 SCC 30], while dealing with an almost similar case. In the said case, an ex parte decree for eviction of the respondent/tenant on the ground of arrears of rent was passed in favour of the appellants, who were the heirs of the deceased original plaintiff/ landlord. When the decree was put in execution, objections were raised by the respondent under

Section 47 read with Order XXI Rule 2 CPC contending that under an oral settlement with the second appellant, who is the son of deceased original plaintiff, made outside the court, he was allowed to stay in the premises as a tenant on a fresh tenancy, on an enhanced rate of rent, waiving all previous dues. There, the Apex Court further observed that after passing of the decree, neither the decree holder/appellants nor the respondent can approach the court under Order XXI Rule 2 CPC for certifying the adjustment of the decree in terms of the so called settlement. In the circumstances, the Apex Court held that the objections filed under Section 47 before the executing court were not maintainable and no investigation is required to be made regarding adjustment of the decree. The said decision of the Apex Court is squarely applicable to the facts of this case.

11. In as much as no adjustment of the decree is recorded in E.P.No.407/04 in R.C.P.No.292/93, the Execution Court was justified in proceeding with the execution of the decree. The circumstances available in the case that despite the alleged settlement arrived at on 21.2.2005, the matter was not reported before the Execution Court either on 28.2.2005 or ever thereafter, despite the fact that delivery was ordered on 2.4.2005 and was resisted by the respondent and delivery was ordered thereafter with police aid goes a long way to show that the agreement alleged to have been executed by the appellant in favour of the respondent cannot be true. Respondent, cannot, on the allegation of an agreement entered into with the appellant, seek to obstruct delivery in E.P.No.407/04 in execution of the order in R.C.P.No.292/93, legally obtained by the appellant in her favour. Further more, circumstances indicated that the respondent was colluding with his wife, the judgment debtor and

instituting the present suit to obtain an injunction, restraining delivery with ulterior motives. The injunction granted in favour of the appellant on such mere allegations is highly irregular and deserves to be set aside.

In the result, in reversal of the order impugned, we dismiss I.A.No.2002/05 in O.S.No. 181/05 on the file of the Subordinate Judge's Court, Thalassery allowing this appeal. Appellant is allowed to realise her costs from the respondent.

(P.R.Raman, Judge)

6th December, 2006

(K.P.Balachandran, Judge)

tkv